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COURT OF APPEALS NO. 63572-7 I

ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA,
husband and wife,

Appellants,

vs.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE
S. IJPMMA and SIEW LOON, husband and wife, and JOHN A. DYER and
PAULINE T. DYER, husband and wife; and STEPHEN J. KLEPPER and
KAREN KLEPPER, husband and wife, and STEVEN J. DAY and CATHERINE
L. DAY, husband and wife, and LIVINGSTON ENTERPRISES, LLC, an
Alabama limited liability company, KAREN M. OMODT, a single woman,
MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife, and CARL
E. JOHNSON and PHYLLIS JOHNSON, husband and wife, and WILLIAM V.
KITCHIN and CHERYL L. KITCHIN, husband and wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HON. JEFFREY M. RAMSDELL

RESPONDENTS' BRIEF ON PLAINTIFFS' APPEAL

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1. INTRODUCTION AND RELIEF REQUESTED

Respondents William V. Kitchin and Cheryl L. Kitchin (the "Kitchins") request that the Ruvalcabas' appeal be denied and the judgment of the trial court dismissing their action and awarding the Kitchins their attorney's fees and costs be affirmed. As this Court found in its earlier examination of Ruvalcabas' claims¹, the delay in bringing these claims is egregious plus, Ruvalcaba is solely responsible for his property's alleged lack of access. Responsibility for causation for the Ruvalcabas' alleged dilemma is certainly a valid and important policy concern. The fact that Ruvalcabas admit to intentionally land locking their property also precludes any finding of implied easement by necessity over the Kitchins' real property. Given these unassailable findings and the undisputed facts, Ruvalcaba has no legal or equitable basis for an easement by necessity over the Kitchins' property (the "Severed Parcel"). Ruvalcaba relinquished any right, title or interest in the Severed Parcel long, long ago. Still, Ruvalcabas' claims create a definite cloud over title to the Severed Parcel. To create, or revive,

¹ CP 283-88 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div: 1, 2007, at Ex. C to J. Schmidt Dec.).

rights in the Severed Parcel for Ruvalcaba at this late date, and after the Kitchins' purchased their property in 2007 upon their justified belief that they were purchasing the Severed Parcel free and clear of any claims by Ruvalcaba, would be extremely unfair and highly prejudicial to the Kitchins, given the undisputed fact that Ruvalcaba is solely responsible for his alleged predicament. Ruvalcaba's claims are time barred. There is no reason to disturb the trial court's award of attorney fees to the Kitchins. The Kitchins are not nominal defendants. The Ruvalcabas have asserted, and have never withdrawn, their affirmative claim to the Kitchins' property in this statutory private condemnation litigation.

For these reasons, the Kitchins request that this appeal be dismissed and that the judgment entered by the trial court below be affirmed.

2. COUNTERSTATEMENT OF FACTS

Most of the relevant facts of this case are best gleaned from the Court of Appeals opinion in the case filed on or about August 27, 2007.²

They are:

² Id.

Rogelio and Elaine Ruvalcaba purchased land in 1965. The property's topography had a definite lower portion and upper portion, separated by a steep slope. The lower portion of the property abutted, and had access to, 42nd Avenue N.E. In 1971, the Ruvalcabas sold the lower portion of the property to Melvin and Arlene Desermeaux.³ However, at that time the **Ruvalcabas failed to reserve access to the upper portion of the property.** They believed such access was impractical both physically and economically due to the natural features of the land.

Prior to the conveyance of the lower portion, the Ruvalcabas attempted to negotiate a number of easements for access to the upper portion of the property. They succeeded in procuring easements from some of their neighbors but did not complete access to a public right of way. **The Ruvalcabas were unable to negotiate other easements to gain access to the upper portion. In March 1972, the conveyance from the Ruvalcabas to Desermeaux was filed. As a result, the upper portion of the land became landlocked. The Ruvalcabas neither obtained a declaratory judgment that ingress or egress over the Desermeaux' property was unreasonable, nor did they seek an easement by necessity over the severed parcel owned by Desermeaux or their successors.**

The land remained undeveloped for more than thirty years. The Ruvalcabas claim they discovered the property was amenable to development in 2005, so once again they decided to seek access. **After self-**

³ Desermeaux was the original grantee of the Severed Parcel. See id. at Note 1.

rendering the property landlocked and failing to procure sufficient easements some thirty years before, the Ruvalcabas asked for the grant of easements over neighboring property, but their requests were denied by a number of the neighboring property owners. Eventually the Ruvalcabas sued a number of the adjoining and non-adjoining property owners to the north for the easements. The complaint alleged a single cause of action, one in common law, seeking to quiet title in an implied easement by necessity across properties of neighbor-defendants.

*2 The neighbor-defendants brought a motion for summary judgment seeking dismissal of the claim. They initially argued the law does not recognize an easement by necessity except over the parcel actually severed. In addition, the defendants argued the common law claim was time-barred and that any condemnation action, had one been raised, would also be barred by the statute of limitations.

In response to the defendants' motion, the Ruvalcabas sought to amend their complaint to add as additional parties other neighbors whose properties, in conjunction with the other defendants, would reach a public thoroughfare. However, they did not seek to add Desermeaux or their successors. In addition, the Ruvalcabas sought to amend the complaint to add a statutory private condemnation claim for a way of necessity.

The trial court granted summary judgment dismissal for the neighbor-defendant landowners. In its order, the trial court found that the Ruvalcabas knew all of the elements of a claim for a common law implied

easement by necessity and a statutory private condemnation for necessity, and that those claims fully accrued as of June 1971. Accordingly, the trial court held that both claims were time barred due to the Ruvalcabas delay in bringing an action. Thereafter, the trial court denied the Ruvalcabas' motion to amend their complaint and dismissed the action with prejudice. From the order, the Ruvalcabas appeal.⁴

Thus, this Court found that Ruvalcaba (1) was solely responsible for landlocking his property; (2) landlocked his property by selling the Severed Parcel without a reservation of access on June 21, 1971 after he learned that his neighbors would not grant him access to the upper portion of their property; and (3) did nothing to secure access to the upper portion for more than 35 years. The Court nevertheless reversed the trial court's dismissal of the Day Group Respondents preserving for Ruvalcaba the right to assert private condemnation claims against the Day Group. In remanding the case, this Court admonished the Ruvalcabas to ". . . first seek a declaratory judgment determining that access through the property severed from their once-owned parcel is

⁴ See Id., pages 2-3 (emphasis added; footnote omitted).

unreasonable."⁵ No finding was made as to whether Ruvalcaba had any rights or interest in the Kitchens' property (the "Severed Parcel").

Ruvalcaba went beyond his Court's directive and filed an Amended Complaint against the Kitchens including a specific assertion that he was entitled to an implied easement by necessity over the Severed Parcel.⁶

The Kitchens successfully moved to dismiss, establishing as a matter of law that Ruvalcaba has no right, interest or title to the Severed Parcel for any reason and under any theory.⁷ Ruvalcaba opposed summary judgment by resubmitting his declaration dated August 11, 2006⁸ which had been submitted in the prior lawsuit. He also submitted his attorney's declaration. No other testimony was presented by Ruvalcaba. Ruvalcaba did not seek leave to submit additional evidence. Nor did he seek CR 56(f) relief.

3. STATEMENT OF ISSUES

A. Does Ruvalcaba have an existing, implied easement of necessity over the Severed Parcel?

⁵ *Id.*

⁶ C.P. 130-168, ¶ 5.6, 6.5.

⁷ C.P. 466-474, 583-586.

⁸ C.P. 386-89.

- B. Has Ruvalcaba waived, or should he be estopped from asserting, an implied easement of necessity over the Severed Parcel?
- C. Are Ruvalcaba's claims time barred by the statute of limitations or by the equitable doctrine of laches?
- D. Whether the trial court abused its discretion by awarding the Kitchens' attorney's fees and costs against the Ruvalcabas?
- E. Are the Kitchens entitled to an award of attorneys' fees and costs on this appeal?

4. LEGAL AUTHORITY AND ARGUMENT

- A. **Ruvalcaba does not have any valid easement rights over the Severed Parcel.**

Any assumption that Ruvalcaba currently has a valid easement by necessity over the Severed Parcel would be incorrect because there is no factual foundation for such an assumption. Here, it is undisputed that Ruvalcaba intentionally placed himself in the position of owning land to which there is no access. His Declaration is fatal. There is simply no factual basis to make any presumption in Ruvalcabas' favor. Even though Washington law may imply an easement by necessity in the

appropriate case, this is not an appropriate case.⁹ Given the undisputed facts presented, Ruvalcabas' knowing, willing and deliberate conduct in landlocking his property precludes any finding of an easement by necessity as a matter of law.¹⁰

1. **Ruvalcaba never had any valid easement rights**

over the Severed Parcel. It is undisputed that the Ruvalcaba landlocked

⁹ Washington's early common law is clear on whether the grantor who landlocked his property was entitled to an implied easement by necessity. There was no relief for the grantor who landlocked his property. It was only the *grantee* that benefitted from the doctrine. See *Long v. Billings*, 7 Wash. 267, 269, 34 P. 936 (1893) (the right to a way of necessity arose at common law when the owner sold land to another, which was cut off from necessary access to a highway by other land at the time owned by the grantor); *State ex rel Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 588, 137 P. 994 (1914) ("the theory of the common law is that, where land is sold that has no outlet, the vendor by implication of law grants one over the parcel of which he retains ownership. It passes as an appurtenance to the parcel expressly conveyed so as to enable the grantee to have access to it. In short, a private way of necessity at common law rests in grant and passes with the parcel expressly granted. The consideration paid for the parcel expressly granted extends to and embraces the appurtenance."). Modern cases tend to look for evidence of an "implied reservation" by the grantor before an easement by necessity is implied to benefit a *grantor*. See *Adams v. Cullen*, 44 Wn.2d 502, 507-510, 268 P.2d 451 (1954) (creation of easement by implied reservation requires higher degree of necessity than for an implied grant). See also, *Evich v. Kovacevich*, 33 Wn.2d 151, 157, 204 P.2d 839 (1949) (intent of the parties is key in finding an implied easement by necessity). As a practical matter, the private condemnation statute at RCW 8.24 *et seq.* with its standard of "reasonable necessity" has usurped the utility of the implied easement by necessity when the landlocked owner is the grantor who caused the problem in the first place. See Comment, *The Implied Easement and Way of Necessity in Washington*, 26 Wash. L. Rev. 125, 133-34.

¹⁰ The reasoning behind the out of state authorities cited by Co-Defendants applies perforce to Plaintiffs' claims against the Kitchins. The law should not reward Plaintiffs for landlocking their property and failing to do anything about it for over 35 years. See generally Day Group's Brief.

their parcel on or about June 21, 1971 when they conveyed the Severed Parcel. By Ruvalcaba's own admission, he sold the Severed Parcel without any reservation of any rights to the Severed Parcel even though he knew he was landlocking his property. Under these circumstances, there is no basis to give Ruvalcaba or any other party to this litigation the benefit of a legal presumption that allows for a finding that an easement by necessity over the Severed Parcel ever existed. The only way an easement by necessity can be implied is to have a finding that Ruvalcaba never intended to sell his interest in the Severed Parcel. This cannot be. Ruvalcaba's Declaration and course of conduct over the last 45 years simply flies in the face of any such conclusion.¹¹ As this Court has already found, Ruvalcaba knew when he sold the Severed Parcel that he had sold his only legal access to his property. He did nothing about his predicament for over 35 years. There is simply no legal or equitable reason for this Court to allow Ruvalcaba access over the Severed Parcel at this late date. The trial court's entry of summary judgment should be affirmed.

¹¹ See CP 386-89 (Ruvalcaba Dec.)

2. **Ruvalcaba abandoned any alleged easement**

rights to the Severed Parcel. An easement may be extinguished by abandonment.¹² When non-use of an easement is accompanied with the express or implied intention of abandonment, an easement may be extinguished, particularly if value was not paid for the alleged easement, and considerable time has elapsed.¹³ Here, to the extent Ruvalcaba ever had easement rights over the Severed Parcel, those rights have been abandoned and the alleged easement terminated as a matter of law. There is no evidence he ever intended to reserve or even claim any right, title, or interest in the Severed Parcel until this litigation. It is undisputed Ruvalcaba never possessed, occupied, or used the Severed Parcel after he conveyed it on June 21, 1971. His claim to the Severed Parcel surfaced only after he faced dismissal in this case. Ruvalcaba abandoned the Severed Parcel and any rights to it on June 21, 1971.¹⁴ All claims against the Kitchins and their property were properly

¹² *Heg v. Alldredge*, 157 Wn.2d 154, 137 P.3d 9 (2006).

¹³ *Id.* at 157 Wn. 2d 161-165.

¹⁴ CP 386-89 (Ruvalcaba Dec., ¶ 8).

dismissed. The trial court's entry of summary judgment should be affirmed.

3. The Kitchins and their predecessors have adversely possessed any right, title, or interest that Plaintiffs may have had to the Severed Parcel. An easement may be extinguished through adverse possession. To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted and adverse to the property owner for the prescriptive period of ten (10) years.¹⁵ When an easement is extinguished through adverse use, the servient estate owner seeking to extinguish the easement must show clearly hostile acts to the dominant estate's interest in order to put the dominant estate owner on notice.¹⁶ Here, it is difficult to conceive of more compelling and convincing evidence of hostility than that of the Kitchins and their predecessors toward any alleged interest Ruvalcaba may have had to this Severed Parcel. It is undisputed that the

¹⁵ *Cole v. Lavery*, 112 Wn. App. 180, 184-187, 49 P.3d 924 (2002).

¹⁶ *Id.*

various owners of the Severed Parcel have improved the Severed Parcel and erected a 2 story, 4 bedroom house with a detached concrete garage well over ten years before this litigation was filed.¹⁷ The trial court's order on summary judgment should be affirmed.

B. Ruvalcaba has waived or should be estopped from asserting any right, title or interest to the Severed Parcel.

Notions of waiver and estoppel saturate and overwhelm any consideration of any right of access over the Severed Parcel. The plain fact is Ruvalcaba has no absolute right to a remedy for the dilemma he brought on himself. Ruvalcaba must bear the consequences of his decisions. There is simply no good reason to elevate Ruvalcaba's property interests over the Kitchens' property interests when Ruvalcaba has ignored his property and any rights that flow from it for over 35 years. Waiver is the intentional relinquishment of a known legal right.¹⁸

¹⁷ C.P. 432-33 (K. Dales Dec.)

¹⁸ *Gross v. Sundling*, 139 Wn.App. 54, 62, 161 P.3d 380 (2007).

Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed the contradict or repudiate his earlier admission, statement or act.¹⁹ Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.²⁰

The point is that Ruvalcaba bore the risk that he might not be granted access after he landlocked his property and ignored the situation for over 35 years. "A party who incurs an obligation with limited knowledge, conscious disregard of surrounding circumstances and awareness of uncertainty must bear the consequences of its decision."²¹

¹⁹ *Heg*, 157 Wn.2d 165.

²⁰ *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009)

²¹ *Public Utility District No. 1 v. Washington Public Power Supply Systems*, 104 Wn.2d 353, 363, 705 P.2d 1195. See also, *Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 388, 397, 739 P.2d 648 (1987) (upholding validity of releases signed by personal injury victims when they knew they were injured but did not know extent or consequences of injuries because they blew the risk by executing releases when they were aware of uncertainty); *Tiegs v. Boise Cascade Corp.*, 83 Wn.App. 411, 414, 426-27, 922 P.2d 115 (1996) (upholding agricultural lease that was contingent on landlord finding "adequate water" for property as landlord alone assumed risk of contaminated water), *aff'd sub nom, Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998).

Similarly here, viewing the situation in the best light possible to Ruvalcaba, he conveyed the Severed Parcel in a climate of uncertainty concerning his ability to secure upland access. In spite of this uncertainty, he reserved no access over the Severed Parcel and did nothing about the situation for over 35 years. He certainly assumed the risk that his calculations would be mistaken and that he would not secure access after conveying the Severed Parcel. He also knowingly waived the right to address the situation in a timely fashion. Ruvalcaba should be estopped from any actions regarding the Severed Parcel on equitable estoppel grounds. By ignoring the situation, Ruvalcaba has lulled all of the Defendants into believing that their title to their properties was clear and free of any claims by him. Obviously, the Defendants all relied on what they believed to be clear title to their properties, and all Defendants have suffered by Ruvalcaba's efforts to finally address the problem he caused 35 years ago with this litigation. Ruvalcaba should also be stopped on judicial estoppel grounds. To allow his claims to proceed against the Kitchens essentially allows him to change his mind in a materially inconsistent manner to obtain an unfair advantage over the

Kitchins and their property. The plain fact is the Kitchins purchased their property believing that it was free and clear of all claims including any claims by Ruvalcaba. Ruvalcaba should be estopped from asserting any claims with respect to the Severed Parcel. The trial court should be affirmed.

C. Plaintiffs' rights are time barred by the applicable statute of limitations and the doctrine of laches.

The Kitchins join in with the Day Group's arguments that Ruvalcaba's claims are time barred. As stated earlier, Ruvalcaba has no rights to the Severed Parcel. His opportunity to eject the Kitchins or their predecessors expired long ago.²² His delay in bringing his claims is "egregious."²³ Ruvalcaba's claims are stale in so many respects. Evidence has been lost and most importantly defenses have been badly prejudiced by the passage of time. This is not a situation where Ruvalcaba did not know the predicament he was in. He sat on his rights,

²² See RCW 4.16.020 (statute of limitations on adverse possession claims is ten years).

²³ See C.P. 283-88, Lexis 2526, p.5.

and his claims should be deemed lost. If anything, he is a speculator.²⁴

He divided his land with the hope he could develop the portion he retained. Now, he is looking to unwind his bad decision. There simply is no public policy that allows Ruvalcaba's real property rights to be elevated so as to run roughshod over the rights of the Kitchins. If anything, the Kitchins and the Day Group have the right to a reasonable degree of certainty and stability in land titles.

Plaintiff's claims are time barred. Ruvalcaba's arguments against a time bar to his claims miss the mark. Even if a public policy of Washington is to not render real property useless, this public policy does not exist in a vacuum. First, there must be proof that the property is truly "useless," which has not been shown here. If such a public policy exists, it only applies to protect property owners so long as they are diligent in protecting their property rights. There is no public policy that

²⁴ This explains why he now wants to "settle" with the Kitchins after dragging them into this case on a claim he now claims no interest, except if it generates settlement dollars. The fact is he is and has been holding the Kitchins and their property hostage by the cloud on their title he has created by his claims against the Kitchins and the Severed Parcel.

rewards a private land owner for sitting on his or her real property rights. To the contrary, Washington law and public policy with its many statutes of limitations and the doctrine of laches manifest an overriding across the board public policy which conditions recognition of private rights and causes of action on due diligence and timely enforcement. Stale claims are not validated and inexcusable delay in protecting one's rights is not rewarded when the rights of others are prejudiced by inexcuseable delay.

Ruvalcaba's arguments that no one has been prejudiced by his failure to address his alleged predicament in a timely fashion is plain wrong. Again, it appears reasonable to conclude Ruvalcaba was a speculator, and gave up on his property after he conveyed the Severed Parcel. But the point is, the Kitchins have no way to recreate or challenge what he may have told others regarding his decision to landlock his property and let it sit for over 35 years. Witnesses have died and moved on. People like the Kitchins have moved in believing there was no adverse claims to their property. Ruvalcaba's claims here are undoubtedly adverse to the Kitchins.

They are also a cloud on Respondents' property, regardless what counsel argues. The prejudice to the Kitchins is not merely the "inconvenience" of litigation. This litigation against the Kitchins, if successful, will by all accounts substantially reconfigure the Kitchins' property and obviously decrease its value. This is why the Kitchins' inability to locate independent evidence and witnesses against Plaintiffs' claims has put the Kitchins' defense on a perilous course. If the case proceeds, the Kitchins will be forced to recreate events spanning over 35 years.

It is therefore critically important to note that this case is here on appeal from a CR 56 order. Ruvalcaba, as the nonmoving party, had a burden to present evidence to avoid summary judgment. He did not meet his burden. He offers little more than vague assertions regarding his actions. He offers no detail of what he did to protect his interests in the property after he landlocked it. He also offers no independent evidence that he exercised any diligence in either protecting his property or prosecuting his claims. To the contrary, all of the evidence speaks loudly and clearly to his sitting on his rights, inexcusably, and without

explanation, to his own detriment, for over 35 years. He should not be rewarded for his failure to take any of the steps necessary to protect his own interests, particularly not if innocent third parties like the Kitchens are penalized in the process.

Plaintiffs' claims should be dismissed with prejudice. The trial court should be affirmed.

D. Ruvalcaba is liable for the Kitchens' attorneys' fees.

The trial court did not abuse its discretion in awarding attorneys' fees to the Kitchens.

1. **Ruvalcaba bears sole responsibility for the Kitchens' attorneys' fees.** Ruvalcaba's arguments against the award of fees to the Kitchens are disingenuous and ignore the realities of this litigation—particularly from the perspective of the Kitchens. The critical point is that the Kitchens are in this litigation because Ruvalcaba sued the Kitchens. The Kitchens are not merely nominal parties to Ruvalcaba's declaratory judgment action. They are actual defendants forced to defend their home and their real property against Ruvalcaba's actual

claims to access over their property to support Ruvalcaba's statutory private condemnation claims.

Ruvalcaba is correct on only one point. The Kitchins' attorney's fees were not necessary. They were not necessary because based on Ruvalcaba's arguments here, Ruvalcaba should never have asserted any affirmative claim against the Kitchins in the first place. This Court's order on remand included the admonition that:

. . . the Ruvalcabas must first seek a declaratory judgment determining that access through the property severed from their once-owned parcel is unreasonable.

The Ruvalcabas went way beyond this Court's mandate and sought actual affirmative relief from and against the Kitchins, claiming that they had actual rights in and to the Kitchins' property and intended to enforce those rights in this statutory private condemnation action brought pursuant to RCW 8.24 *et seq.*

If as Ruvalcaba claims now, he truly never intended to expose the Kitchins to attorneys' fees, he should not have claimed a right of access over the Severed Parcel in his Amended Complaint. He affirmatively asserted a claim for relief that he now admits was neither necessary nor

supportable. Further, in contrast to what he now says, he never withdrew his claim and has cavalierly denied that any cloud existed over the Kitchins' title to their property due to Ruvalcaba's claims²⁵. To avoid exposure to the Kitchins' claims for attorneys' fees, Ruvalcaba merely had to concede on the record in his Complaint that he did not claim any rights to the Kitchins' property. He did exactly the opposite. In fact, he still has not withdrawn his claim, and will not withdraw his claim unless he is paid to withdraw it. As it stands, on this record, the Kitchins and their property are at peril. The trial court did not abuse its discretion in awarding attorneys' fees and costs to the Kitchins.

2. **The Kitchins never waived any claim to attorneys' fees.** This case does not involve RCW 4.84.280, the statute relied upon by Ruvalcaba. This case involves claims under RCW 8.24 *et seq.* Civil Rule 54(c) controls. It plainly states as a general rule that:

Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

²⁵ C.P. 456-62, p. 4.

CR 54(c). The fact that the Kitchins first sought attorneys' fees after summary judgment was entered, has no bearing on the trial court's award of attorneys' fees which was entered after the Kitchins filed their Answer to the Complaint and requested attorneys' fees. *See Lugan v. Santoya*, 41 Wn.2d 499, 501, 250 P.2d 543 (1952) (court holds that where the allowance of costs is governed by statute, a specific prayer for them in a pleading is unnecessary). Ruvalcaba admits, as he must, that RCW 8.24 *et seq.* does provide for attorneys' fees. In fact, he actually cites the recent Supreme Court decision in *Noble v. Safe Harbor Family Preservation Trust*, ___ Wn.2d ___, 216 P.3d 1007 (2009) which supports the trial court's award of attorneys' fees to the Kitchins in this matter. There, the Washington Supreme Court held that the plain language of RCW 8.24.030 grants trial courts discretion involving awards of attorneys' fees against the party that joins a party to an action under the private condemnation statute when the joined party successfully defeats the joining party's claims.²⁶ Here, the Kitchins were joined by Ruvalcaba. Ruvalcaba asserted claims against the Kitchins, and the Kitchins defeated Ruvalcaba's claims. Under the circumstances,

²⁶ *Noble*, at 1011.
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the trial court's award of attorneys' fees is wholly appropriate and was not an abuse of discretion. It should be affirmed. The Kitchins should also be awarded their fees and costs in this appeal.

5. CONCLUSION

The appellants' alleged predicament is solely the responsibility of the appellants. For the reasons stated, the appellants have no rights to the Kitchins' property. The trial court's dismissal of the appellants' claim should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 18th day of November, 2009.

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Appellants,

vs.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE
S. IJPMA and SIEW LOON, husband and wife, and JOHN A. DYER and
PAULINE T. DYER, husband and wife; and STEPHEN J. KLEPPER and
KAREN KLEPPER, husband and wife, and STEVEN J. DAY and CATHERINE
L. DAY, husband and wife, and LIVINGSTON ENTERPRISES, LLC, an
Alabama limited liability company, KAREN M. OMODT, a single woman,
MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife, and CARL
E. JOHNSON and PHYLLIS JOHNSON, husband and wife, and WILLIAM V.
KITCHIN and CHERYL L. KITCHIN, husband and wife,

Respondents.

CERTIFICATE OF SERVICE.

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1. I, Cathy L. Anderson, declare that I am employed by the law firm of Hanson Baker Ludlow Drumheller P.S., that I am over eighteen years of age and not a party to this action.

2. I certify under penalty of perjury under the laws of the state of Washington that on this date I served a true and correct copy of the Respondents' Brief on Plaintiffs' Appeal on the following attorneys of record in the above referenced action by the method indicated below:

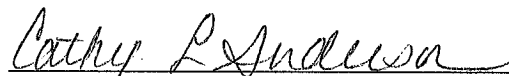
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Via Fax & U.S. Mail

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Attorney for Day Group Defendants

Via Messenger

DATED this 18th day of November, 2009.


Cathy L. Anderson